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CLERK

NUMBER: _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

COOPER STEVEDORING COMPANY, INC., AND
EMPLOYERS NATIONAL INSURANCE COMPANY,
Petitioners,

versus

AETNA CASUALTY & SURETY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the indemnity clause of the Alabama State Docks Tariff, which requires users of the Alabama State Docks to indemnify the Alabama State Docks for its own negligence, violates § 17 of the Shipping Act of 1916, 46 U.S.C. § 816, 98 Stat. 89, and, therefore, is void and unenforceable as a matter of law.[1]

---

[1] In compliance with Rule 28.1 of the Supreme Court Rules, Petitioners list the following: Cooper/T. Smith Corporation, T. Smith & Son, Inc., T. Smith & Son (Texas), Inc., Crescent Towing & Salvage Co., Inc., Elmar Marine Corporation, Plimsoll Marine, Inc., Sela Towing Company, Inc., Overseas Fleeting, Inc., Royal Jones Corporation, Gulf States Forwarding, Inc., Seaport, Inc., S.T.S. Investments, Inc., Donegan Lumber Company, Dockside Elevators, Inc., Upper St. Rose Fleeting, Inc., L & L Fleeting, Inc., Overseas Freight Corporation, Cooper Shipping Company, Inc., RGZ, Inc., Iecom Corporation, Gulf Elevator & Transfer Company, Saint John Stevedoring, Inc., C.S.C. Assurance, Ltd., Employers Casualty Company, Employers National Life Insurance Company, Texas Employers Insurance Association, a mutual company, Employers Casualty Corporation, and Employers National Corporation.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Cooper Stevedoring Company, Inc., and Employers National Insurance Company,[2] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Alabama, entered in the above-entitled proceeding on October 3, 1986, as extended on application for rehearing on February 27, 1987, reversing a grant of summary judgment by the Circuit Court of Mobile County, Alabama, in Petitioners' favor.

---

[2] Employers National Insurance Company was erroneously labelled "Employer's National Insurance Company" in the opinion of the Supreme Court of Alabama. This usage is not continued herein except in the opinion of the Supreme Court of Alabama contained in Appendix A.

Opinions Below

The Circuit Court of Mobile County, Alabama, granted Petitioners' motion for summary judgment prior to trial and entered an order granting Petitioners' motion for summary judgment on March 15, 1985. Said order is not reported. The opinion of the Supreme Court of Alabama, as extended, is printed in Appendix A (pp. 1A-9A).

Jurisdiction

On March 15, 1985, the Circuit Court of Mobile County, Alabama, entered an order granting Petitioners' motion for summary judgment. The Supreme Court of Alabama, on October 3, 1986, reversed the lower court's grant of summary judgment, and on February 27, 1987, the Supreme Court of Alabama, while extending its earlier opinion, denied Petitioners' application for rehearing.

Under the provisions of 28 U.S.C. § 2101(c), the time for filing this Petition expires Thursday, May 28, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statute Involved

The statutory provision involved is Section 17 of the Shipping Act of 1916, 46 U.S.C. § 816, 98 Stat. 89.

Just and reasonable regulations and practices; supervision by Commission

Every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

Statement Of The Case

Petitioner Cooper Stevedoring Company, Inc., [hereinafter "Cooper"] provides general cargo handling services

at the Alabama State Docks in the Port of Mobile, Alabama, and Petitioner Employers National Insurance Company [hereinafter "ENIC"] is Cooper's compensation carrier. The Alabama State Docks [hereinafter "ASD"], a public facility, is the only general cargo facility, public or private, in the Port of Mobile and is, therefore, the only facility at which Cooper can operate. On October 13, 1978, Benjamin Franklin, an employee of Cooper, was injured while on the job at the ASD. Franklin is no longer a party to these proceedings and has no interest herein. Franklin, pursuant to the Alabama direct action statute, Ala. Code § 33-1-25 (1975), brought suit alleging negligence on the part of ASD and Respondent Aetna Casualty & Surety Company [hereinafter "Aetna"] in the Circuit Court of Mobile County, Alabama, seeking damages for his injuries. Aetna is the insurance carrier for the ASD.

Aetna, after answering Franklin's complaint, filed a third-party complaint against Cooper and ENIC claiming, in part, that Cooper and ENIC were bound to indemnify Aetna for any recovery by Franklin. This claim was for total indemnity and did not account for any negligence on the part of the ASD. This indemnity claim was based on Item 108 of the ASD Tariff. Item 108 is set forth in its entirety in Appendix B hereto. Item 108 requires a person using the facilities of the ASD to indemnify the ASD for all damages "caused in whole or in part by such person . . . ."

The Circuit Court of Mobile County, Alabama, granted summary judgment to Cooper and ENIC. Cooper and ENIC argued in their brief in support of their motion for summary judgment that the indemnity provision violated § 17 of the Shipping Act of 1916, 46 U.S.C. § 816.

At trial of Franklin's case, the ASD and, therefore, Aetna was found at fault, and, Franklin, after remittitur, recovered $300,000.00 against Aetna. Petitioners were not parties to the trial, and no findings were made as to them. Aetna then appealed the grant of summary judgment in favor of Cooper and ENIC to the Alabama Supreme Court.

Cooper and ENIC, in their brief before the Alabama Supreme Court, again argued, *inter alia*, that Item 108 was in violation of 48 U.S.C. § 816 and was, therefore, void as a matter of law and unenforceable. Petitioners also argued that the indemnity provision was invalid because it was part of an adhesion contract. The court, however, ruled that Item 108 was a valid indemnity agreement under federal maritime law. On application for rehearing before the Alabama Supreme Court, Petitioners reasserted their argument that the indemnity provision was unenforceable under 46 U.S.C. § 816. Petitioners also argued, as they had done earlier, that the indemnity provision was invalid because it was part of an adhesion contract. On February 27, 1987, the Supreme Court of Alabama, while extending its earlier opinion, denied Petitioners' application for rehearing, holding that the ASD could obtain full indemnity from Cooper and ENIC, even if Franklin's injuries were caused in part by the negligence of ASD. The court, in addition to denying the existence of an adhesion contract, again held that Item 108 was valid under federal maritime law.

After reversing the lower court's grant of summary judgment, the Supreme Court of Alabama remanded the third-party action for further proceedings below.

Reasons For Granting The Writ

The decision of the Alabama Supreme Court holding that the ASD can obtain indemnity for its own negligence directly conflicts with the principles enunciated in decisions of this Court, with well-established federal maritime law, and with a ruling of the Federal Maritime Commission invalidating a virtually indentical provision in the tariff of the Port of Galveston.

Petitioners first address the issue of the finality of the decision of the Alabama Supreme Court. The Supreme Court of Alabama has remanded this case for trial in the Circuit Court of Mobile County. Normally, such a remand

indicates that the matter is not so "final" as to warrant review by this Court. Petitioners maintain, however, that this case falls squarely within the first category of cases this Court has considered "final" for purposes of review as set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The Supreme Court of Alabama has correctly ruled that federal maritime law governs the interpretation of the ASD Tariff. Appendix A at 3A. The Alabama court, however, has dismissed all of Petitioners' federal maritime law attacks upon the indemnity provision and has ruled that "the indemnity clause must be enforced." Appendix A at 8A.

This case, therefore, is most similar to *Mills v. Alabama*, 384 U.S. 214 (1966) (cited in *Cox Broadcasting Corp. v. Cohn* at 479), in which this Court allowed an appeal from a reversal by the Alabama Supreme Court of a grant of demurrer. No trial had occurred. The case involved the application of Alabama's "no electioneering on election day" law and the conviction of an editor of a Birmingham newspaper for publishing an editorial on election day urging voters to vote in a particular way. The trial court had sustained demurrers to the complaint on the grounds that the statute abridged freedom of speech. The Alabama Supreme Court, however, reversed the trial court, holding that the law did not abridge freedom of speech, and the editor appealed to this Court. On appeal, the State of Alabama argued that since the Alabama Supreme Court had remanded the case to the trial court for further proceedings [a trial], the Supreme Court of Alabama's judgment could not be considered "final." Justice Black, writing for this Court, stated:

> This argument has a surface plausibility, since it is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict [the editor] under this state statute if he wrote and published the editorial. [The

editor] concedes that he did, and he therefore has no defense in the Alabama trial court. Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more that a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of [the editor's] constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets.

Id. at 217-18. This Court took the appeal in *Mills* because there was no doubt of the result at trial. In this case also, the mandate to the trial court is clear — "the indemnity clause must be enforced." Appendix A at 8A. Moreover, a remand of this case would cause an inexcusable waste of judicial time and energy.

Although factually different because no state law is involved, this case is also similar to cases in category four of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482. Justice White defined these cases, stating:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character

> of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-83.

This case involves no state law and technically does not come within the ambit of category four; however, there is no doubt that a reversal of the Alabama Supreme Court, which would reinstate summary judgment in favor of Petitioners, would preclude further litigation of this matter. Moreover, allowing the decision of the Alabama Supreme Court to stand will "seriously erode federal policy" of uniformity in maritime law since, as is shown below, the Alabama court's opinion is contrary to well-established federal maritime law.

Petitioners, therefore, respectfully submit that the fact that this case has been remanded for trial should in no way affect this Court's decision in granting the requested writ of certiorari to the Alabama Supreme Court. Petitioners submit that for all practical purposes this case is "final" and appropriate for review by this Court.

---

1. The seminal case in maritime law which holds that a party may not contract against liability for its own negligence is *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). Although *Bisso* more properly involved a release-from-liability provision in a contract between a tugboat and its tow, the case, nevertheless, has been cited by many courts and the Federal Maritime Commission as authority in holding that indemnity clauses in the tariffs of public dock facilities are void as a matter of law. It is clear that Justice Black, writing for the Court, did not intend the rule against indemnity clauses set forth in *Bisso*

to be limited to the facts of the case before the Court. "This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers." *Bisso*, 349 U.S. at 90-91.

The Alabama Supreme Court, in reversing entry of summary judgment in favor of Petitioners, has allowed the ASD, a public facility, to escape liability for its own negligence. That the ASD can escape liability for its own negligence is clear from a reading of the indemnity clause. Item 108, the indemnity clause of the ASD Tariff, is set forth in full in Appendix B, and, in pertinent part, provides:

> *INDEMNITY*
> Each person using a facility of the Alabama State Docks Department . . . shall indemnify and save the Alabama State Docks Department harmless from and against any and all claims . . . caused *in whole or in part* by such person . . . without regard to fault. (emphasis added).

The language *"in whole or in part"* allows the ASD to have indemnity from a user of ASD facilities when only "part" of the negligence causing an injury is the fault of the person using the ASD facilities. For example, the ASD could be ninety-nine percent responsible for an injury and still have one hundred percent indemnity from the person using its facilities, when in fact, that person is only one percent at fault. Such a result would clearly violate the rule of *Bisso v. Inland Waterways Corp.*, and cannot be countenanced.

2. The decision of the Alabama Supreme Court allowing the ASD to have indemnity for its own negligence conflicts with decisions of the United States District Courts. The United States District Court for the Southern District of Mississippi, in *Jackson County Port Authority v. Pate Stevedore Company of Pascagoula*, No. S77-0285 (N) (S.D.

Miss. April 14, 1980) (reproduced in Appendix C), was presented with an indemnity clause in a public port's tariff similar to the indemnity clause of the ASD Tariff in a case in which a longshoreman was injured at the public docks. Like Aetna herein, the port authority sought indemnification from the longshoreman's employer under the indemnity provision of the tariff when it was sued by the longshoreman. On motion for summary judgment by the employer, the court stated:

> This Court is compelled to follow established law as enunciated in the *Bisso* . . . and the *West Gulf Maritime* cases, supra, and therefore holds that the provisions of the Tariff in question which relieve Plaintiff [the port authority] from liability for its own negligence are unenforceable as against public policy and constitute unreasonable practices under Section 816 of the Shipping Act, 1916. Accordingly, Plaintiff's Motion for Summary Judgment will be denied. Defendant's Cross Motion for Summary Judgment will be sustained, the Defendant [the employer] owing no duty of indemnification to Plaintiff under the terms of the Tariff and the undisputed facts of this case.

Jackson County Port Authority v. Pate Stevedore Company of Pascagoula, No. S77-0285 (N), slip op. at 6 (S.D. Miss. April 14, 1980).

This case is not the first time Aetna has sought indemnity under the Tariff provision, but when proceeding in federal court, Aetna has failed in acquiring indemnity under the Tariff provision. In *Aetna Casualty & Surety Company v. Cooper Stevedoring Company*, No.80-0395-H (S.D. Ala. July 25, 1980) (the complaint and dismissal order of which are reproduced in Appendix D), Chief Judge W. B. Hand of the Southern District of Alabama granted Cooper's motion to dismiss a complaint in which Aetna sought indemnity from Cooper based upon

the indemnity provision of the ASD Tariff. Aetna, since the ruling by the Alabama Supreme Court in this case, can now have indemnity if it simply files its complaints in state court. Such totally opposite treatment of the same Tariff provision applying the same federal maritime law clearly indicates that this Court should review the opinion and decision of the Alabama Supreme Court, reverse that decision, and bring Alabama law into compliance with federal maritime law.

3. The decision of the Alabama Supreme Court directly conflicts with a ruling of the Federal Maritime Commission invalidating an indemnity provision in the tariff of the Port of Galveston which is virtually identical to the indemnity provision in the ASD Tariff. The Federal Maritime Commission is the federal agency charged with regulating the terms and conditions of the tariffs of docks in the United States, and federal courts have routinely shown deference to the decisions of the Federal Maritime Commission. *Maryland Port Administration v. SS American Legend*, 453 F. Supp. 584, 593 (D. Maryland 1978). In *West Gulf Maritime Association v. Galveston*, 1981 A.M.C. 938 (F.M.C. 1979), the Federal Maritime Commission held void as a matter of law the indemnity provision in the tariff of the Port of Galveston. This provision, which is essentially identical to the indemnity provision of the ASD Tariff stated:

> INDEMNITY: Each User of the facilities of the Board of Trustees of the Galveston Wharves shall indemnify and save harmless the Board of Trustees of the Galveston Wharves and the City of Galveston from and against any and all claims, actions, damages, liability and expense ... caused *in whole or in part* by any such User ....

Id. at 940-41 (emphasis added). The language *"in whole or in part"* is identical to the language of the ASD Tariff on which Aetna bases its claim in this case. The Federal Maritime Commission held that indemnity provisions containing the language *"in whole or in part"* in tariffs of

public facilities, which the ASD is, are void as a matter of law. It matters not how the clause is sought to be applied — maritime law holds such clauses to be void *ab initio*. The Alabama Supreme Court in its opinion, Appendix A at 4A, stated: "Aetna is not seeking indemnification for negligence on the part of the State Docks; rather, it is seeking indemnification for an injury caused by Cooper's negligence and the negligence of its employees." The Supreme Court of Alabama ignored the law that indemnity clauses are void as a matter of law. It matters not that Aetna was seeking indemnity for the negligence of Cooper and its employees, if any. The indemnity clause is void and unenforceable under all circumstances. In fact, Aetna is seeking total indemnity regardless of the fact that the ASD and Aetna were held liable to Franklin at trial.

The Federal Maritime Commission, in *West Gulf Maritime Association v. Galveston*, stated:

> It is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships. See, e.g., *Bisso v. Inland Waterways Corp.*, 349 US 85, 1955 AMC 899 (1955) . . . .
>
> Although the Port's indemnification requirement in the instant proceeding would not apply if the Port were wholly responsible for an occurrence, it would apply in situations in which the Port was partially responsible, even if more so than the user. We find that the indemnity requirements and the waiver of claims and subrogation provisions of the Port's tariff are unreasonable for precisely the reasons enunciated in *Bisso* . . . , and conclude that Item No. 98.1 [the indemnity clause] is violative of Section 17.

West Gulf Maritime Association, 1981 A.M.C. at 941-43. The Federal Maritime Commission held that indemnity provisions which allow public docks to have indemnity when, in fact, they are in part at fault, are void as a matter

of law. Such indemnity clauses violate § 17 of the Shipping Act of 1916, 46 U.S.C. § 816.

The ASD Tariff, as it is worded, would allow the ASD to have indemnity even though its own negligence far outweighed the negligence of the user. It matters not how the clause is applied in the instant case since such clauses violate § 17 of the Act and are, therefore, void as a matter of law.

The ASD is a public facility, and the *Bisso* rule against indemnity clauses is particularly applicable to public facilities. *Bisso*, 349 U.S. at 91. The Federal Maritime Commission has also recognized this distinction in *United States Lines, Inc. v. Maryland Port Administration*, 1981 A.M.C. 952 (F.M.C. 1980), stating:

> In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 1955 AMC 899 (1955), the Supreme Court enunciated the principal that release-from-negligence clauses are invalid as a matter of law in both common carrier and contract carrier relationships.
>
> . . . .
>
> A public terminal operator such as MPA is clearly in a position such that exculpatory clauses in its tariff create an unreasonable hardship upon those how would be consequently liable for the port's own negligence.

United States Lines, Inc., v. Maryland Port Administration, 1981 A.M.C. at 958-59. Since the ASD is a public facility and is, in fact, the *only* facility, public or private, at the Port of Mobile at which general cargo can be handled, an indemnity clause in the ASD Tariff which allows the ASD to have indemnity for its own negligence clearly violates § 17 of the Act, and such clause is void as a matter of law and can have no legal effect, regardless of how it is to be used.

The decision of the Alabama Supreme Court clearly conflicts with the opinions and decisions of the Federal Mar-

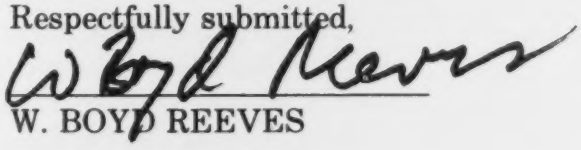
itime Commission. As noted above, the Federal Maritime Commission is the federal agency directly charged with authority to regulate docks and wharves in the United States and to insure that practices and tariffs are fair and reasonable. The Federal Maritime Commission has ruled that indemnity provisions similar to the indemnity provision in the ASD Tariff are void as a matter of law. Therefore, the ruling of the Alabama Supreme Court, upholding this tariff provision, cannot be allowed to stand.

4. The decision of the Alabama Supreme Court involves an important question of federal maritime law which affects the entire maritime industry. A direct conflict in the interpretation of federal maritime law between the Alabama Supreme Court and federal courts and agencies should be addressed by this Court, and the question here presented should be settled for the guidance of both state and federal courts and for the parties whose rights are effected thereby.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ for certiorari should be granted.

Respectfully submitted,



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Proof Of Service

I, W. BOYD REEVES, Counsel of Record for the Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of May, 1987, I served three copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Alabama on Aetna Casualty & Surety Company, Respondent herein, by mailing the same in a duly addressed envelope, with first class postage prepaid, to Honorable Charles E. Sharp and Honorable Mac B. Greaves, attorneys for Respondent, at their office address, 1100 First National-Southern Natural Building, Birmingham, Alabama 35203.

W. Boyd Reeves

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APPENDICES

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In view of our holding that Aetna stands in the shoes of the State Docks and is attempting to enforce a valid agreement, we turn to the merits of the claim for indemnity. Summary judgment is appropriate if, after viewing the evidence in a light most favorable toward the non-moving party, there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. *Sexton v. Liberty National Life Insurance Co.*, 405 So. 2d 18 (Ala. 1981). Aetna contends that it presented a scintilla of evidence of negligence on the part of Cooper which would entitle it to indemnification from Cooper.

The deposition testimony indicated that the cause of Franklin's injury was improper stacking or "piling in" of bundles of lumber that were unloaded at Franklin's direction. The lumber was stacked by Cooper employees approximately 12 to 15 feet high. The testimony showed that Franklin gave directions concerning the placement and storage of the lumber. There was also testimony that two of Franklin's immediate supervisors were aware of the fact that the floor in the warehouse was sunken and uneven but they did not mention this condition to Franklin.

We find that the above testimony presents a scintilla of evidence which creates a genuine issue as to negligence on the part of Cooper. Therefore, summary judgment in favor of Cooper is improper.

Claim Against Employer's National

Aetna asserts that since it legally stands in the shoes of the State Docks and the State Docks is an additional named insured under the policy between Employer's National and Cooper, it is entitled to a defense and coverage from Cooper with respect to Franklin's claim against it.

A named insured, as well as additional named insureds under an insurance policy, is entitled to a defense and coverage from an insurer; however, the defense and coverage are limited to those provided for in the language of the policy. *National Surety Corp. v. Wells*, 287 F.2d 102 (5th Cir. 1961); *Lazarus v. Manufacturers Casualty Insurance Co.*, 267 F.2d 634 (D.C. Cir. 1959); *Gulf Oil Corp. v. Mobile*

Drilling, Barge or Vessel, 441 F. Supp. 1 (E.D. La. 1975), affirmed.

In the instant case, the State Docks is an additional named insured under the policy between Employer's National and Cooper. Cooper was required to maintain insurance naming the State Docks as an additional insured pursuant to the State Docks tariff. We have already held that Aetna stands in the shoes of the State Docks; therefore, Aetna is entitled to a defense and coverage from Employer's National if the policy provides for such under the facts of this case. We cannot determine from the record whether the language of the policy with Employer's National provides a defense and coverage in this instance, because the terms of the policy are not contained in the record. The facts may prove that the State Docks is entitled to a defense and coverage from both Aetna and Employer's National, in which case Aetna should be allowed to seek recovery from Employer's National because Aetna has already defended the State Docks in the suit filed by Franklin. See *National Surety Corp. v. Wells*, supra; *Lazarus v. Manufacturers Casualty Insurance Co.*, supra; *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel*, supra. Because there are issues of fact to be resolved, summary judgment in favor of Employer's National was improper.

Aetna's final argument is that the trial court's order denying Aetna's motions for summary judgment against Cooper and Employer's National constitutes reversible error. Based upon our findings as discussed above, there are genuine issues of material fact to be resolved; therefore, the trial court was correct in denying Aetna's motions for summary judgment.

In light of the foregoing, the summary judgment in favor of Cooper and Employer's National is reversed, and the denial of summary judgment for Aetna is affirmed.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Torbert, C. J., and Jones, Shores, and Adams, JJ., concur.

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SUPREME COURT OF ALABAMA

84-697 Aetna Casualty & Surety Co. v. Cooper Stevedoring Co., Inc. and Employer's National Insurance Co.

ON APPLICATION FOR REHEARING

STEAGALL, JUSTICE.

Cooper and Employer's National present two arguments in their application for rehearing which merit further consideration.

The first argument is that the Alabama State Docks tariff is an adhesion contract that should not be enforced because the State Docks has superior bargaining power. Cooper and Employer's National assert that the State Docks is the operator of the only general cargo docking facility at the Port of Mobile; therefore, they say, the State Docks has superior, if not absolute, bargaining power in contracting for the use of its facilities. Accordingly, they argue, the indemnity provisions of the tariff should be held void as a matter of law.

Cooper and Employer's National cite *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577 (5th Cir. 1986), and *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483 (9th Cir. 1983), for the proposition that federal maritime law refuses to enforce an indemnity clause which is part of an adhesion contract when there is evidence that one of the parties to the contract has a superior bargaining position or is overreaching. Both of these cases involve limitation of liability clauses in which shipyards attempted to limit their responsibility for their own negligence in proximately causing injuries and damages to their customers. The court in each case found there was no violation of public policy in enforcing these clauses in view of the fact that there was a complete absence of any evidence of unequal bargaining power of overreaching.

In the instant case, Cooper and Employer's National assert that the tariff was offered to Cooper by the State Docks on a "take it or leave it" basis and that there was overreaching and unequal bargaining power surrounding the negotiation of the tariff. However, there is no evidence in the record to support these assertions. The fact alone that the State Docks is the only general cargo docking facility at the Port of Mobile is not sufficient to establish unequal bargaining power. Therefore, the indemnity clause must be enforced.

The second argument of Cooper and Employer's National is that the indemnity clause in the tariff is against public policy, and thus, void as a matter of law. Cooper and Employer's National rely on *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *West Gulf Maritime Ass'n. v. Galveston*, 22 F.M.C. 101 (1979).

In *Bisso*, the United States Supreme Court held that a towboat operator may not contract against all liability for its own negligent towage. This holding was based on the characteristics of the towing industry and has not been applied to all admiralty related contracts. See *Oritz v. ETPM-U.S.A., Inc.*, 553 F.Supp. 549 (S.D. Tex. 1982), and *Hudson Waterways Corp. v. Coastal Marine Service, Inc.*, 436 F.Supp. 597 (E.D. Tex. 1977).

West Gulf is an administrative decision of the Federal Maritime Commission. The Commission, relying on *Bisso*, held that an exculpatory clause between Galveston and West Gulf was against public policy, and, therefore, violated the Shipping Act of 1916. However, this Court and the federal courts are not bound by the rulings of the Federal Maritime Commission. *Maryland Port Administration v. S.S. American Legend*, 453 F.Supp. 584 (D. Md. 1978).

In *United States v. Seckinger*, 397 U.S. 203, 211 (1970), the Supreme Court, in analyzing an indemnity clause in a contract between the Government and a contractor, held that "a contractual provision should not be construed to

permit an indemnitee to recover for his own negligence unless the court is firmly convinced that such an interpretation reflects the intention of the parties." The Supreme Court expressly rejected the proposition that such indemnity contracts were contrary to public policy.

Althouth *Seckinger* was not an admiralty case, its holding has been consistently followed in the Fifth Circuit. See, e.g., *M.O.N.T. Boat Rental v. Union Oil Co.*, 613 F.2d 576, 580 n. 8 (5th Cir. 1980); *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 241 n. 2 (5th Cir. 1977); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge Mr. Charlie*, 424 F.2d 684, 691-92 (5th Cir. 1970); *Batson-Cook Co. v. Industrial Steel Erectors*, 257 F.2d 410 (5th Cir. 1958).

We believe the ruling in *Seckinger* should control our consideration of the indemnity clause in the instant case. The indemnity clause in the contract between the State Docks and Cooper clearly requires Cooper to indemnify the State Docks for claims arising out of Cooper's performance under the contract, whether or not the injuries made the basis of such claims were caused in whole or in part by Cooper. Accordingly, the conclusion in our original opinion is not changed and petitioners' application for rehearing is overruled.

OPINION EXTENDED; APPLICATION OVERRULED.

Torbert, C. J., and Jones, Shores, and Adams, JJ., concur.

APPENDIX B

108 INDEMNIFICATION OF ALABAMA STATE DOCKS DEPARTMENT

INDEMNITY

Each person using a facility of the Alabama State Docks Department and each person performing any services on the property of the Alabama State Docks Department shall indemnify and save the Alabama State Docks Department harmless from and against any and all claims, actions, damages, liability, and expense, including reasonable attorneys fees and litigation expenses, in connection with loss of life, personal injury and damage to property (including property of such person) occuring in connection with the use of any facility of the Alabama State Docks Department and the performance of any service on the property of the Alabama State Docks Department caused in whole or in part by such person, or the employees (including loaned employees), agents contractors and invitees of such person, without regard to fault. Each person using a facility of the Alabama State Docks Department and each person performing any service on the property of the Alabama State Docks Department waives all claims it may have against the Alabama State Docks Department for loss or damage covered under any insurance policy and each such person shall cause its insurance carriers to waive any right of subrogation with respect thereto and to so notify the Alabama State Docks Department.

APPENDIX C

SOUTHERN DISTRICT OF MISSISSIPPI
F I L E D
APRIL 14, 1980
[Illegible] G. Henderson. Clerk Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JACKSON COUNTY PORT AUTHORITY, PLAINTIFF

VERSUS CIVIL ACTION NO. *S77-0285 (N)*

PATE STEVEDORE COMPANY OF PASCAGOULA,

INC., a Corporation, DEFENDANT

MEMORANDUM OPINION

This cause came on to be heard on Motion of the Plaintiff for Summary Judgement and Cross Motion of the Defendant for Summary Judgment and the Court, after having heard and considered same, together with oral argument and briefs of counsel, and the pleadings and exhibits filed herein finds as follows:

That at all material times Plaintiff was a public agency established under state and county law to operate a port of entry designated as the Greater Port of Pascagoula, Mississippi, (hereafter called "Port). Defendant was and is a duly organized stevedoring company licensed under the law to perform stevedoring services at the Port. The services include loading and unloading of waterborne cargo from vessels.

Plaintiff established the Port of Pascagoula Tariff (hereafter called "Tariff") which set out the rules, regulations and charges applicable to the services Plaintiff provides as a Port and terminal operator. Defendant and other like businesses would have been forbidden entrance to the Port had they not agreed to the blanket terms of the Tariff.

That at all material times Plaintiff and the Port were subject to the terms and provisions of the Shipping Act, 1916. (46 U.S.C., 801 et seq.) By law Plaintiff was required to and did file the Tariff with the Federal Maritime Comission. 46 U.S.C., Section 816, 820, 841a; 46 C.F.R., Section 533.

That among the provisions of the Tariff under which Defendant was required to consent to if it desired to work the Port were that all wooden pallets at the Port during the period in question were under Plaintiff's sole ownership. Possession of privately owned pallets at the port was strictly forbidden. By the Tariff Plaintiff had the sole responsibility for the repair and cleaning of all pallets and was paid a rental for their use.

On or about May 15, 1975, employees of the Defendant were performing stevedoring services while unloading bales of rubber from a vessel moored at Port terminals G and H. Defendant's business activity at these terminals was by virtue of the Tariff. At this time Lee A. Brown, while working as a stevedore for the Defendant and while unloading cargo from the vessel, was involved in an accident injuring him and another stevedore.

Both injured stevedores were provided benefits by Defendant under the Longshoremen's and Harbor Workers' Act. Brown subsequently filed a third party lawsuit against Plaintiff herein, which case is pending on the docket of the Circuit Court of Jackson County, Mississippi, being Cause No. 9944. In that lawsuit Brown maintains that he and other employees of the Defendant were in the hold of a ship and had loaded bales of rubber onto a wooden pallet owned and maintained by Plaintiff herein and which was rented to Defendant herein for use in unloading the ship. It was further alleged that while being raised from the ship's hold the pallet disintegrated dropping bales of raw rubber into the hold striking Brown. The main issue of the lawsuit filed by Brown is the active negligence of Plaintiff in the unsafe and improper maintenance of its own pallets while they were being used

for the purpose for which Defendant rented them.

As to the *Brown* case, Plaintiff called upon Defendant to indemnify and hold Plaintiff harmless from its own alleged negligence pursuant to the terms of the Tariff including specifically Rules 25, 280, and 215.

The Court finds that as to all of the aforesaid material facts there are no genuine issues and that the only issue presented to this Court is one of law as to whether or not such Tariff provisions are unlawful and unenforceable under the circumstances of this case.

Under the Tariff Plaintiff provides terminal services and facilities including wharfage, dockage, warehouses and rental equipment to carriers by water and stevedoring companies for cargo handling. The Port is a United States port of entry which provides for the waterborne transportation of cargo from across the world. As such Plaintiff is a "person" subject to the Shipping Act, 1916 (46 U.S.C., Section 801 et seq.) (hereafter called "Act").

Section 16, First, of the Act (46 U.S.C., 815) declares it unlawful for any common carrier by water *or other person subject to the Act:*

> "To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

> Section 17: Second Paragraph, of the Act (46 U.S.C. 816) provides:

> "Every such carrier and *every other person subject to this act* shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission (Federal Maritime Commission) finds that any such regulation or practice is unjust or unreasonable it may

determine, prescribe, and order enforced a just and reasonable regulation or practice." (emphasis added)

The Federal Maritime Commission, in order to discharge its responsibilities under Section 17 of the Act, adopted General Order 15, 46 C.F.R., 533, which requires every terminal operator including Plaintiff, to file its Tariff with the Commission.

At the time of his accident Brown was performing work of a maritime nature which was related to the handling of waterborne cargo while in the hold of a vessel. The law is well settled that District Courts should apply federal maritime law once it has been determined that the matter is of maritime character and concern. The present case is based upon a maritime contract involving specifically controlling maritime law, which this Court will apply.

Exculpatory clauses in the maritime industry have long been viewed with suspicion and in most cases have been held unlawful. *THE STEAMER SYRACUSE*, 12 Wall. 167 (1870); *United States v. Atlantic Mutual Insurance Co., et al.*, 343 U.S. 236.

In the Case of *Bisso v. Inland Waterways Corporation*, 349 U.S. 85 (1955), the Supreme Court again held that in the water transportation industry contract clauses releasing towing companies from their own negligence were invalid and unenforceable as against public policy. The Court in applying admiralty law to the exculpatory clause of a towing contract held that such were invalid and that its holding,

"was merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers

pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." In this connection, also see 175 A.L.R., p. 18.

Plaintiff's operation of the Port is a public function exercised for public purposes. Plaintiff is clearly charged with a duty of public service. The American Law Institute in *Restatement of Contracts*, Volume 2, Section 575 (1) holds that a party charged with the duty of public service cannot bargain against its own negligence in the performance of any part of its duty to the public for which it has received compensation. Such would directly apply to the Plaintiff in this case.

Under the Act and the regulations previously cited, the Federal Maritime Commission does have express statutory authority to determine the validity or the reasonableness of Tariff provisions. Pursuant to 46 U.S.C., 816 "whenever the Commission finds that any (tariff) regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation and practice." This power extends to regulations and practices of terminal operators in connection with the furnishing of port services and facilities. *American Export-Insbrandtsen Line, Inc. v. Federal Maritime Commission*, 444 F.2d 824 (1970), *Greater Baton Rouge Port Commission v. United States, et al.*, 287 F.2d 86 (5th Cir., 1961) 368 U.S. 984.

The Federal Maritime Commission has repeatedly ruled that an indemnification requirement in a terminal tariff which would relieve a port from liability for its own negligence is an unreasonable practice under Section 816 of the Act.

The Commission considered the validity of an exculpatory clause in the tariff of the New York Terminals Conference in *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505, and held that:

"It is neither just nor reasonable for respondent

(terminal operator) to disclaim liability for all delays and their attempt to do so was invalid under Section 17." (46 U.S.C., 816) at p. 515.

This order was affirmed by the Court of Appeals in *American Export-Isbrandtsen Lines, Inc. v. Federal Maritime Commission*, 389 F.2d 962 (D.C. Cir., 1968).

A provision in the Tariff of the Stockton (California) Port District which served to relieve the Port from damage for liability caused in whole or in part by the fault of the Port was found to be unenforceable as a violation of Section 816 of the Act. *Lucidi v. Stockton Port District*, 19 S.R.R. 441 (June 8, 1979). The initial Decision, which became final for want of an Appeal, stated:

> "To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence, by the mere publication of an exculpatory tariff provision, is unjust and unreasonable, in violation of Section 17 of the Act." (46 U.S.C. 816).

A case remarkably similar to the present one is the recent decision of the Federal Maritime Commission in *West Gulf Maritime Association v. The City of Galveston, et al.*, September 14, 1979, Docket No. 77-56. In this case, the West Gulf Maritime Association (composed of steamship agents and stevedore companies using Port facilities along the Gulf of Mexico) initiated a complaint with the Federal Maritime Commission alleging, among other things, that the Tariff of the Galveston Wharves (the Port) violated Sections 16 and 17 of the Act (46 U.S.C. 815, 816). Parties to the proceedings were W.G.M.A., the Port, and intervenors The California Association of Port Authorities, the Alabama State Docks Department, and the Commission's Bureau of Hearing Council.

Among those in question was a tariff provision which required the stevedoring companies to indemnify the Port against the Port's own negligence. The Commission affirmed the ruling of the Administrative Law Judge and

found that such an exculpatory provision was invalid, unenforceable, and in violation of Section 816 of the Act. The Commission went on to hold that not only was it unreasonable to require a stevedoring company to indemnify the Port against the Port's own negligence, it was equally unreasonable to require a stevedoring company to secure insurance related to that indemnity.

This Court is compelled to follow established law as enunciated in the *Bisso, Truck and Lighter, Lucidi,* and the *West Gulf Maritime* cases, supra, and therefore holds that the provisions of the Tariff in question which relieve Plaintiff from liability for its own negligence are unenforceable as against public policy and constitute unreasonable practices under Section 816 of the Shipping Act, 1916. Accordingly, Plaintiff's Motion for Summary Judgment will be denied. Defendant's Cross Motion for Summary Judgment will be sustained, the Defendant owing no duty of indemnification to Plaintiff under the terms of the Tariff and the undisputed facts of this case.

A Judgment conforming with this Memorandum Opinion shall be presented to this Court, within the time prescribed.

This the 14th day of April, 1980.

s/ Waltor L. Nixon, Jr.

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIVISION ALABAMA
SOUTHERN DIVISION

AETNA CASUALTY & SURETY CO., a corporation, Plaintiff,	§	
vs.	§	
COOPER STEVEDORING CO., INC., a corporation, Defendant.	§	CIVIL ACTION NO. 80-0395-H

COMPLAINT

Comes now the Aetna Casualty & Surety Co., a corporation, by and through its respective counsel, and upon information and belief alleges the following:

I

At all times hereinafter mentioned, the Plaintiff, Aetna Casualty & Surety Co., was and now is a corporation organized and existing under and by virtue of the laws of the State of Connecticut.

II

At all times hereinafter mentioned, the Defendant, Cooper Stevedoring Co., Inc., a corporation, was a corporation organized, existing or residing under or in a foreign state or country that is unknown to the Plaintiff but will be added by amendment when ascertained; said Defendant was at all times hereinafter mentioned doing business within the City of Mobile, State of Alabama and is subject to the jurisdiction of this Honorable Court.

III

At all times hereinafter mentioned, there existed a policy of insurance issued by the Plaintiff to and on the behalf of

the Alabama State Docks Department, State of Alabama, which policy of insurance provided for, among other things, general liability coverage for claims for property damage or personal injury which might be brought against the Alabama State Docks Department, save for its governmental immunity.

IV

On or about September 23, 1976, a civil action was filed in the United States District Court for the Southern District of Alabama, Southern Division, by Herbert Hall against the Plaintiff herein, Civil Action No. 76-512-T, seeking to recover damages for personal injury received by him on the 17th day of October 1975, pursuant to his duties as an employee of Defendant working as a longshoreman aboard a vessel at the Alabama State Docks, Pier South B, Berth #3. Plaintiff Hall, therein, further alleged that the accident and resulting injuries received by him occurred when scrap metal being loaded into a hold aboard the vessel upon which he was working, was dropped on him.

V

Plaintiff alleges that at the time and on the occasion of the accident and injury upon which the above referenced civil action was filed by Herbert Hall, there existed a rental contract between the Alabama State Docks Department and the Defendant herein, Cooper Stevedoring Co., Inc., a corporation, which rental agreement was subject to the terms and conditions set forth in Item 1006 of the Alabama State Docks Department Tariff No. 1-B and amendments thereto, copies of which are attached hereto as Exhibit "A" collectively.

VI

Pursuant to the terms of the rental agreement and the applicable State Docks Department Tariff No. 1-B, Defendant herein agreed to assume sole responsibility and liability for injury or death of any person whomsoever, or damage to or destruction of property of any such person, including employees or property of the State Docks, incident to, arising out of or connected with the user's possession, use, or operation or custody of such equipment,

and the user agreed to protect, indemnify and save harmless the State Docks from and against any and all liability for or in respect of the same or any part thereof. On the occasion of the accident upon which the suit by Herbert Hall was filed, a crane to which was attached a magnet was being used to perform the Defendant's work. As a result of the failure and refusal of the Defendant to abide by the terms of its rental agreement and the Docks Department Tariff No. 1-B, the Plaintiff herein, was required to assume the defense of the action filed by Herbert Hall. The action filed by Herbert Hall resulted in a jury verdict in the amount of $186,000.00 in Mr. Hall's favor. Said jury verdict was caused to be appealed by the Plaintiff herein. The verdict of the jury, together with interest accumulating thereon, was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit on May 19, 1980.

VII

WHEREFORE, Plaintiff demands judgment against the Defendant for all sums it has been caused to pay to the Plaintiff as a proximate cause of the Defendant's breach of contract as set forth above, together with interest, costs and reasonable attorney's fees.

SINTZ, PIKE, CAMPBELL
& DUKE
Attorneys for Plaintiff

By: s/ Daniel A. Pike

DANIEL A. PIKE
3763 Professional Parkway
Mobile, Alabama 36609

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
213 U.S. COURT HOUSE & CUSTOM HOUSE
MOBILE, ALABAMA 36602

DATE: July 25, 1980

TO: Daniel A. Pike
W. Boyd Reeves & Douglas L. Brown

RE: CIVIL ACTION NO. 80-0395-H

AETNA CASUALTY & SURETY CO.

VS.

COOPER STEVEDORING CO., INC.

****
****

You are advised that on the 25th day of July, 1980 the following action was taken in the above-entitled case by Judge W. B. Hand:

Deft's motion to dismiss filed July 10, 1980 is GRANTED. Rule 54 judgment to be entered accordingly.

WILLIAM J. O'CONNOR, CLERK,

By: s/John V. O'Brien
Deputy Clerk